RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case Number: CHI/40UC/LBC/2009/0005

Re: 12 St Peter's Road, Burnham-on-Sea, Somerset, TA8 1HB

In the matter of an application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant or condition in a lease has occurred.

BETWEEN:

Mercia Investment Properties Limited Applicant

and

Linda Margaret Corbin and Richard Stephen Lampshire Respondents

Date of application: 20 March 2009
Date of application to dismiss: 7 May 2009
Members of the Tribunal: Mr. J G Orme (Lawyer chairman)
Mr. M Ayres FRICS (Valuer member)
Date of hearing: 10 August 2009
Date of decision: 12 August 2009

Decision of the Leasehold Valuation Tribunal

It is recorded that:

1. **The Respondents withdraw their application dated 7 May 2009 to dismiss the application.**
2. **The Respondents admit that a breach of covenant had occurred as set out in the application dated 20 March 2009.**
3. **In the light of that admission, there was no requirement for the Tribunal to make a determination in respect of the application dated 20 March 2009.**

On the application by the Applicant for a determination in respect of costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002, for the reasons set out below, the Tribunal determines that the Respondents shall pay £250 towards the costs of the Applicant in connection with these proceedings.

Reasons

Background

1. By a lease dated 16 October 1974, R M Smith Properties Ltd let to Nicholas William George Burke and Linda Rose Burke the property known as 12 St Peter's Road, Burnham-on-Sea, Somerset, TA8 1HB ("the Property").

2. At clause 2j of the lease, the lessee covenanted with the lessor *"within one month after every assignment assent transfer or underlease (otherwise than by way of mortgage) of the demised premises to give notice thereof in writing with particulars thereof to the lessor's solicitors and to produce such assignment assent transfer or underlease to the lessor .....to pay to the lessor's solicitors a registration fee of two pounds plus value added tax at the rate applicable at the time of payment in respect of each such assignment assent transfer underlease or devolution."*

3. The Applicant is the current freehold owner of the Property.

4. The Respondents are the current leasehold owners of the Property.

5. By letter dated 20 March 2009 the Applicant applied to the Tribunal for a determination that a breach of covenant had occurred in that the Respondents had failed to give notice of assignment within one month as required by clause 2j of the lease.

6. On 25 March 2009 the Tribunal gave directions for a determination of the application on the basis of written submissions.

7. By letter dated 7 May 2009 the Respondents applied, through their solicitors, pursuant to regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 for an order that the application be dismissed as frivolous or vexatious or otherwise an abuse of the process of the tribunal, that the Applicant do provide a valid receipt for the fee paid to the Applicant and a determination that the Applicant do pay the Respondents' costs in the sum of £500 pursuant to Schedule 12 (2)(b) of the Commonhold and Leasehold Reform Act 2002 ("the Act").

8. On 12 May 2009 the Tribunal gave further directions for the Respondents' application to be heard following exchange of written representations.

9. On 9 June 2009 the Respondents filed their written representations in support of their application. No representations were received in writing from the Applicant.

The Law

10. Section 168 of the Act provides that a Landlord under a long lease of a dwelling may not serve a notice under Section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant in a lease unless the tenant has admitted the breach or the matter has been finally determined by a court or arbitral tribunal or by a Leasehold Valuation Tribunal under

Section 168(4). That sub-section provides: *"A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of covenant or condition in the lease has occurred."*

11. Paragraph 10 of Schedule 12 to the Act provides:

"(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances within sub-paragraph (2).

(2) The circumstances are where -

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7; or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

12. Regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 gives the tribunal power to dismiss an application on a request from a Respondent if the tribunal considers that the application is frivolous, vexatious or otherwise an abuse of the process of the tribunal.

The Facts

13. The facts leading up to the making of the applications are not in issue and are recorded in correspondence between the parties.

14. On 13 February 2009 the Respondents' solicitors, Barrington & Sons ("Barrington"), wrote to the Applicant's agents, Circle Residential Management Ltd ("Circle") *"We confirm that we acted in a Transfer of Equity in respect of the above mentioned property on the 7th of April 2003 and we belatedly hereby give you notice of the Assignment together with a certified copy of the Transfer with our cheque in the sum of £2.30 being the fee prescribed by the Lease. We enclose a copy of this letter for receipting and return."*

15. On 17 February Circle acknowledged receipt of that letter and sent Barrington a copy of their general guidance note and asked for payment of a late registration fee.

16. On 20 February Barrington wrote to Circle objecting to the demand for a further fee.

17. On 24 February Circle wrote to Barrington *"In response to your letter of 20th inst. as you are well aware the notice of transfer you have provided has not been served in accordance with the terms of the lease. Unless you admit this*

alleged breach of covenant on behalf of your client within 7 days of the date of this letter we will, without further reference to yourselves of your client make an application under s168(4) CLRA 2002 for this matter to be determined. We will of course seek an order for cost if such an application proves necessary."

18. On 26 February Barrington sent an email to Circle taking issue with Circle's position and saying *"Section 168(1) requires admission that there is a breach no such admission is admitted as notice has been given and the prescribed fee paid."*

19. There was an exchange of emails between Barrington and Circle between 20 and 23 March in which Circle notified Barrington that the application had been issued. In the concluding message on 23 March Circle said *"May I also suggest that you immediately accept that there has in fact been a breach of tenant's covenant since this is a prima facie matter and an early admission will limit the costs incurred which we will seek to recover from your client."*

20. The application was sent to the Tribunal on 20 March.

21. On 27 March Barrington wrote to Circle enclosing a copy of an opinion obtained from Harry Hodgkin of counsel. The opinion does not deal directly with the issue as to whether or not there had been a breach of covenant but considers whether Circle were entitled to demand a further fee for late notice and whether Circle would be entitled to serve a valid notice under Section 146(1) of the Law of Property Act 1925. The opinion does, by implication, accept that there had been a breach of covenant because at paragraph 21 it says *"a. the breach has been remedied; ... c. the breach, such as it was, was de minimis."* In their covering letter Barrington invited Circle to withdraw the application and warned that they would apply for the application to be dismissed with costs.

22. The Tribunal has seen no further correspondence between the parties and Mr. Redding for the Respondents told the Tribunal that there had been none.

23. On 9 April Barrington wrote to the Tribunal confirming that they were instructed to oppose the application.

24. On 7 May Barrington wrote to the Tribunal asking for the application to be dismissed.

The Hearing

25. The hearing took place at the Bridgwater and Albion R.F.C. on 10 August 2009. The Applicant was represented by Mr. Paine of Circle Residential Management Ltd. The Respondents were represented by Mr. Redding, a partner of Barrington & Sons.

26. Prior to the start of the hearing, the Tribunal gave the parties a copy of the decision of the Lands Tribunal in the case of *GHM (Trustees) Ltd and Barbara and David Glass LRX/153/2007.*

27. Mr. Redding opened the case on behalf of the Respondents by relying on the written submissions to the Tribunal which were largely a re-iteration of counsel's opinion. He sought to distinguish the GHM case on the basis that it concerned a continuing breach whereas there was no continuing breach in this case. After an exchange of views, Mr. Redding accepted that the jurisdiction of the Tribunal was limited to determining whether or not a breach of covenant had occurred and that it had no jurisdiction to determine whether or not the Respondents should obtain relief from forfeiture in relation to any such breach.

28. After a brief adjournment, Mr. Redding confirmed to the Tribunal that the Respondents' application was withdrawn and that the Respondents admitted that a breach of covenant had occurred as set out in the application. In the light of that admission, it was not necessary for the Tribunal to proceed to make a determination in respect of either the Respondents' application or the substantive application by the Applicant.

29. Mr. Paine then asked the Tribunal to make a determination pursuant to paragraph 10 of Schedule 12 to the Act that the Respondents should pay the costs of the Applicant limited to £500.

Submissions on costs

30. Mr. Paine submitted that the Respondents had acted *"otherwise unreasonably"* in connection with the proceedings in that they had had ample opportunity to admit the breach of covenant both before and after issue of the application but had declined to do so until the morning of the hearing. In particular he relied on the letter from Circle to Barrington dated 24 February inviting Barrington to admit the breach before the application was issued, the last paragraph of the letter from Barrington to Circle dated 27 March in which Barrington threatened to apply to have the application dismissed and the letter from Barrington to the Tribunal in which they stated that the Respondents opposed the application. He said that the Respondents had acted unreasonably in refusing to admit the breach of covenant in an open and shut case and that there was no reason why the admission could not have been made before the day of the hearing.

31. Mr. Paine gave evidence that he is a fellow of the Property Consultants Society and an associate of the Institute of Residential Property Management. He said that his charge out rate is £215 per hour plus VAT and that he would be engaged at least 3 hours in travelling to and attending the hearing.

32. Mr. Paine referred the Tribunal to the previous decisions of other Tribunals in the cases of *14 Twymans Mill, Faversham, CHI/29UM/LBC/2008/0007* and *25 Sunderland Close, Rochester CHI/00LC/LSC/2008/0044*.

33. Mr. Redding opposed the application for costs. He said that when his firm sent notice of assignment to Circle, it replied by demanding further fees. Circle had not responded to Barrington's letter dated 27 March and there had been no correspondence since then. Costs should not be awarded against his clients because Circle had sat on their hands and refused to correspond until today.

34. As to the amount of costs, Mr. Redding said that Mr. Paine's charge out rate was too high and he suggested that the amount of any award should be either minimal or no more than £250.

Conclusions

35. It is clear to the Tribunal that Barrington & Sons have been blinded from the outset of the correspondence by the demand for a further registration fee. This lead them to overlook the reality of the application which was made to the Tribunal which was for a determination that a breach of covenant had occurred. Mr. Redding accepted at the hearing that a breach of covenant had occurred. That admission could have been made before the application was made to the Tribunal or at least as soon as it was made. The Tribunal accepts that the Applicant asked the Respondents to make that admission both before and after the application was issued but no admission was forthcoming. If an admission had been made, the parties could have moved on to the more important issues of the late registration fee and the consequences of the breach, thereby saving the Applicant the expense to which it has been put in making the application and attending the hearing. The Tribunal is satisfied that the Respondents have acted unreasonably by not making an admission at an earlier date and that it is appropriate to determine that the Respondents should pay some of the Applicant's costs.

36. The Tribunal accepts that it would have been sensible for the Applicant to write a further letter to the Respondents before the hearing pointing out the reality of the situation. The Tribunal considers that it would be disproportionate to make the Respondents pay £500 in view of the size of the matter in dispute. For those reasons the Tribunal determines that the Respondents should pay £250 towards the costs of the Applicant in connection with the proceedings which for the avoidance of doubt includes both the Applicant's application and the application by the Respondents.

Mr. J G Orme
Chairman
Dated 12 August 2009